IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2005

CORAM

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM
and
THE HONOURABLE MR. JUSTICE T.V. MASILAMANI

Criminal Appeal No.138 of 2003

Kaveri .. Appellant

Vs.

The State of Tamilnadu, rep.
by the Inspector of Police,
Salem Steel Plant Police Station,
(Crime No.142 of 2000)
Salem. .. Respondent

Criminal Appeal preferred under Section 374 Cr.P.C. as against the conviction and sentence imposed in the judgment of the learned I Additional Sessions Judge cum Chief Judicial Magistrate, Salem, dated 14.09.2001 in S.C.No.290 of 2000.

For appellant Mr. R.V. Karthi for Mr. D. Shivakumaran
For respondent : Mr. E. Raja,
Additional Public Prosecutor.

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J U D G M E N T

(Judgment of the Court was delivered by M. KARPAGAVINAYAGAM, J.)

The conviction imposed upon the appellant under Section 302, IPC for having caused the murder of his wife by pouring kerosene and setting fire to her body is being challenged in this appeal filed by him.

2. The short facts leading to the filing of the appeal are as follows:

(a) The deceased Sakunthala was given in marriage to the accused/appellant 8 years back. Out of their wedlock, two male children and one female child were born to them. Though the accused used to work in a silver factory, he would not be regular for work due to his bad activities. He indulged in consuming arrack and spending time in playing cards with others. There used to be

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frequent quarrel between the accused and the deceased, the accused invariably demanding money from the deceased in order to meet the expenditure towards his bad habits. Despite the efforts of the deceased to correct him, the accused continued to carry on with his bad activities and beat the deceased whenever he was not paid the money demanded by him. The matter was reported several times to the parents of the deceased as well as to P.W.4, Perumal, who is the brother of the deceased. But, both of them used to pacify the deceased and asked her to go back to the matrimonial home.

(b) The fateful occurrence took place on 31.1.2000 at about 4.30 p.m. The accused had a quarrel with the deceased since she did not pay the amount which was demanded by him for drinking. When the deceased refused to pay the amount, the accused abused her stating that he would not live with her any more and that she should commit suicide by taking poison, or else, he would kill her. When the wordy quarrel was going on, the accused suddenly took a can of kerosene, poured the kerosene over the body of the deceased, took out a match stick from the match box and threw the burning match stick on the body of the deceased, thereby setting the deceased on fire. The deceased, having been engulfed in the fire, came out of the house and the neighbours who gathered there put out the fire by pouring water on her. The information as to this occurrence reached P.W.4, P.W.5, who is the mother of the deceased and the husband of P.W.5, viz., the father of the deceased. All of them came and saw the deceased with burn injuries. When they enquired as to what happened, the deceased told them that since she refused to pay her husband the amount demanded by him for drinking purpose, he poured kerosene and set fire on her. Since the injuries found all over the body of the deceased were serious, they engaged an auto and took her to a hospital.

(c) P.W.8, the doctor, admitted her and gave her treatment. Immediately thereafter, he sent Ex.P.5, intimation to the police regarding the admission of the deceased in the hospital with burn injuries. He also issued Ex.P.6, accident register in which it was stated that the deceased told him that she was set on fire by her husband. P.W.8, doctor, sent requisition to the Judicial Magistrate requesting him to record the statement of the deceased as her condition was serious. Accordingly, P.W.6, Judicial Magistrate, went to the hospital and after satisfying himself as to the consciousness of the deceased with the help of P.W.7, Dr. Varadharaju, recorded her dying declaration, Ex.P.2. Exs.P.3 and P.4 are the endorsements made by P.W.7.

(d) P.W.13, the Sub-Inspector of Police, on receipt of the intimation from P.W.8, doctor, came to the hospital in the early morning on 1.2.2000 at 2 a.m., recorded his statement and registered it as a complaint for an offence punishable under Section 307, IPC against the accused. Ex.P.13 is the complaint. After registering

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the case, the FIR was sent to the Court as well as the superior officers. P.W.14, the Inspector of Police, took up further investigation of the case, went to the spot and prepared the Ex.P.10, observation mahazar and Ex.P.16, rough sketch. He also recovered the burnt materials, including the kerosene can. Then he continued the investigation.

(e) In the meantime, the accused surrendered before P.W.11, the Village Administrative Officer and gave a statement confessing that he poured kerosene and caused burn injuries on the body of the deceased. That statement is Ex.P.12. Thereafter, he was produced before P.W.14, who in turn, arrested him and sent him for judicial custody.

(f) P.W.7, the doctor, continued to give treatment to the deceased, but however, she died on 6.2.2000 and the death intimation was sent to the police. P.W.13, the Sub-Inspector of Police, on receipt of the death intimation, altered the F.I.R. into one punishable under Section 302, IPC, prepared express report and sent the same to the Court as well as his superior office. P.W.14, the Inspector of Police took up further investigation. He came to the hospital and conducted inquest. The inquest report is Ex.P.17. The material objects were sent for chemical analysis through the Court. After completing the investigation, he filed a charge sheet against the accused for the offence under Section 302 IPC.

(g) During the course of trial, on the side of the prosecution, P.Ws.1 to 14 were examined, Exs.P.1 to P.17 were filed and M.Os.1 and 2 were marked.

(h) On the side of the defence, D.W.1, the son of the accused was examined.

(i) The accused, while being questioned under Section 313, Cr.P.C. with reference to the incriminating materials, denied his complicity in the crime.

(j) The trial court, after having considered the evidence placed on record, concluded that the prosecution has established its case beyond all reasonable doubt, convicted the accused for the offence under Section 302 IPC and the said judgment is the subject matter of the appeal before this Court.

3. Mr. R.V. Karthi representing Mr. D. Shivakumaran, the counsel on record, would take us through the entire evidence and contend that the materials available on record would not be sufficient to hold that the accused alone has perpetrated the crime and that the dying declaration recorded by the officials is not consistent and as such, the accused is liable to be acquitted by

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giving the benefit of the doubt. Alternatively, the counsel, on the strength of two decisions, viz., *2000-1-L.W. (Crl.) 192 (Jai Karan v. State of (N.C.T.Delhi) and 2005 MLJ (Crl.) 1 (Pauldas v. State)*, would submit that if this Court comes to the conclusion that the death of the deceased occurred on account of the burn injuries caused by the accused, the offence would come only under Section 304(II) and not under Section 302, IPC.

4. On these aspects, the learned Additional Public Prosecutor was heard. Of course, there is no eye witness in this case. The prosecution relied on the following materials :-

(i) The oral dying declaration as spoken to by P.W.4 and P.W.5, who are respectively the brother and mother of the deceased.

(ii) The dying declaration recorded by P.W.7, doctor, P.W.6, the Judicial Magistrate, P.W.13, the Sub-Inspector of Police at different times on the same day.

(iii) Recovery of burnt materials and the kerosene can from the scene of occurrence.

(iv) Surrender of the accused before P.W.11, the Village Administrative Officer, who recorded the extra-judicial confession by him, Ex.P.12.

5. According to the prosecution, the deceased, in order to take care of her children, had to undertake some coolie work and earn her livelihood. The husband of the deceased never used to go for work and earn money for the family. On the other hand, in order to spend money towards his consumption of arrack and also for playing cards, he used to frequently demand money from the deceased. On the fateful day, when the money demanded was not paid, according to the prosecution, the accused poured kerosene and set fire to her. On receipt of the information, P.W.4, the brother of the deceased, accompanied by P.W.5, the mother of the deceased went and asked the deceased as to how she sustained burn injuries. She had given clear details as to what happened. Immediately, P.W.4 took her to the hospital in the auto and admitted her. The fact that P.W.4 admitted the deceased in the hospital has been clearly established by the evidence of the doctor, P.W.8 and Ex.P.5. Ex.P.6 is the accident register. Both in Exs.P.5 and P.6, P.W.8 would mention that the deceased was brought to the hospital by P.W.4, Perumal, the brother of the deceased. P.W.4 would state that he was accompanied to the hospital by P.W.5, the mother of the deceased. P.W.10, the auto driver would also state that the deceased was brought in his auto from her house to the hospital by P.W.4, Perumal as well as another old lady, who is P.W.5, the mother of the deceased. When the aspect of the deceased being accompanied by P.W.4 to the hospital has been

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established, there is no reason to reject the evidence of P.W.4 who speaks about the oral dying declaration.

6. The earliest statement by the deceased was made to P.W.4, the brother of the deceased. Regarding the other oral dying declaration, it is the prosecution case that the first document indicating the dying declaration was the statement made by the deceased to the doctor at about 7.30 p.m. P.W.8 would categorically state that the deceased told him that the burn injuries found on her body were caused by her husband, which is evident from Ex.P.6, accident register.

7. The next document is the statement recorded by P.W.6, the Judicial Magistrate, who came to the hospital on receipt of the requisition given by P.W.8, doctor and recorded the statement of the deceased at 9 p.m. As soon as P.W.6 came to the hospital, he enquired the deceased in order to verify whether she was in a conscious stage to give a statement. After putting some questions, P.W.6 was satisfied that she was fit enough to give a statement and he took an endorsement from P.W.7, doctor certifying her consciousness to give a statement, which is Ex.P.3. After recording the statement, P.W.6 again obtained an endorsement from P.W.7, doctor, which is Ex.P.4.

8. The next document relating to the dying declaration is Ex.P.13, statement recorded by P.W.13, the Sub-Inspector of Police on 1.2.2000 in the early morning at 2 a.m. It is pointed out that there is variation between these dying declarations. We are not able to find any variation which is vital. A perusal of these three documents, viz., Exs.P.6 recorded by P.W.8 at 7.30 p.m., Ex.P.2 recorded by P.W.6 at 9 p.m. and Ex.P.13 recorded by P.W.13 at 2 a.m. on 1.2.2000 would make it clear that there was quarrel between the husband and wife and that when the money was not paid to the accused which he demanded from the deceaed, he poured kerosene and set fire to the body of the deceased.

9. It is true that she did not die immediately after the occurrence. But the fact remains that continued treatment was given by P.W.7, the doctor till her death. On receipt of the death intimation, P.W.13, the Sub-Inspector of Police altered the F.I.R. and sent the intimation to the Court as well as his superior officers and the case was thereupon altered into one under Section 302 I.P.C. Mere delay in the death would not be sufficient to hold that the accused did not intend to cause the death of the deceased. As a matter of fact, even on the date of admission, the doctor found that there were 88% burn injuries on the body of the deceased. P.W.9, the doctor who conducted the postmortem, through Ex.P.9, would state that the death was due to burn injuries, though it was suggested that she sustained the burn injuries due to the bursting of a stove. P.W.8,

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the doctor would assert that these injuries would not have been caused by a stove burst since these injuries were found not only on the front of the body, but also on the back of the body as well. Not only these three dying declarations have been corroborated by the other oral dying declarations as spoken to by P.Ws.4 and 5, but also the oral evidence through the evidence adduced by P.Ws.6, 8 and 14 would establish the prosecution case. Further more, it is corroborated by P.W.9, the doctor who conducted the postmortem, who would give an opinion in Ex.P.9 that the deceased would have died due to the burn injuries sustained, which were assessed at 88%.

10. Learned counsel for the appellant would cite a decision reported in 2000-1-L.W. (Crl.) 192 (Jai Karan v. State of (N.C.T.Delhi) in order to establish that the conviction cannot be based merely on the oral dying declaration, which is not corroborated. But, this decision would not apply to the facts of the present case as they stand on the different footing. It is settled law that a dying declaration can be the basis of a conviction, provided it indicates credibility. In this case, the dying declaration given by the deceased to the doctor, the Magistrate and the Police Officers is not only consistent, but it also gives all the particulars, which have been corroborated by other materials. It is pointed out that the evidence of D.W.1 would make the prosecution story unbelievable. We should scrutinize the evidence adduced by D.W.1 keeping in mind that D.W.1, being the son of the deceased aged about 9 years, was under the care and custody of the accused, who was on bail during that time.

11. A perusal of the evidence of D.W.1 would clearly indicate that his entire evidence suffers from artificiality. According to D.W.1, the deceased herself, after putting out the fire, asked D.W.1, the son, who was playing at that time on the road, to inform her husband/accused about her going to the hospital for taking treatment and asking her husband to come to the hospital. If such an evidence adduced by D.W.1 is true, we are at a loss to understand as to why the deceased had to accuse her husband while narrating the incident to P.Ws.4 and 5. Further, she has given the very same statement to the doctor, who admitted her in the hospital and in the light of the fact that she suffered from serious injuries, he sent the information to both the police and the Judicial Magistrate to record her dying declaration and at 9 p.m., the Judicial Magistrate came and recorded the dying declaration. Even at that time, the deceased was so specific in saying that the burn injuries were caused only by the accused by pouring kerosene over her and setting her on fire. In the light of the credible evidence adduced by the independent witnesses, viz., P.W.8, doctor, P.W.6, the Judicial Magistrate and P.W.13, the Sub-Inspector of Police, we are unable to believe the evidence of D.W.1.

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12. Lastly, as indicated above, a faint attempt has been made by the counsel for the appellant that at the most, the offence would fall under Section 304(2), IPC and not under Section 302, IPC. He would cite a decision reported in *2005 MLJ (Crl.) 1 (Pauldas v. State)* in order to substantiate this claim. The facts in the said decision are entirely different from the facts of the case on hand. In that case, the deceased gave a dying declaration ten days after the incident. Further, no details have been given through the doctors as to what type of treatment was given to her. But that is not the case here. The deceased was immediately taken to the hospital by his brother, P.W.4, whose name is mentioned in the medical record and she has given a statement to the doctor and then to the Judicial Magistrate and thereafter to the Sub-Inspector of Police and further, treatment was given to her by P.W.7, the doctor, till her death. Therefore, the deposition given by P.W.7 both in the chief and in the cross-examination would indicate that proper treatment has been given to the deceased, but despite that, she died. Hence, the question of lesser offence would not arise, especially when the intention of the accused to cause the death of his wife is so explicit in the sense that he poured kerosene over the body and set fire to her by throwing the lighted match stick on her.

13. Further, admittedly, both of them were living in one and the same house. If they had been living in a cordial atmosphere, there is no necessity for the accused to abscond initially and to surrender before P.W.11, after two days. Nothing has been elicited from P.W.11, the Village Administrative Officer, to indicate that such a statement has not been obtained. But the fact remains that up to 2.2.2000, the accused had never shown any anxiety to visit the hospital to take care of his wife. On the other hand, he absconded till 2.2.2000 and thereafter surrendered before P.W.11 and gave an extra-judicial confession statement to P.W.11.

14. For all the above reasons, the act committed by the accused by pouring kerosene, setting her on fire and causing burn injuries all over the body of the deceased which resulted in her death would clearly reveal that the intention of the accused was to kill his wife. Therefore, we do not find any merit in the appeal and the same is dismissed.

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To

1. The I Additional Sessions-cum-Chief Judicial Magistrate, Salem
2. -do- thro The Principal Sessions Judge, Salem.
3. The Judicial Magistrate No.I, Salem.
4. The District Collector, Salem.
5. The D.G.P., Mylapore, Chennai.
6. The Superintendent of Central Prison, Coimbatore.
7. The Inspector of Police, Salem Steel Plant Police Station, Salem.
8. The Public Prosecutor, High Court, Madras.

+1cc to Mr.D.Sivakumaran, Advocate Sr 33407

HPR (CO)
km/5.9.

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